

The Illegal Diversion of Aircraft and International Law. Aerial Highjacking as an International Crime. Les Moyens De Prevention Et De Sanction En Cas D' Action Illicite L' Aviation Civile Internationale

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BOOK REVIEWS

THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW by EDWARD McWHINNEY. Leyden: Sijthoff. Biblio. 1975. Pp. vi + 150. \$12.00 paper.

AERIAL HIGHJACKING AS AN INTERNATIONAL CRIME by NANCY DOUGLAS JOYNER. Dobbs Ferry: Oceana Publications. Biblio., appendices, index. 1974. Pp. viii + 344. \$17.50 cloth.

LES MOYENS DE PREVENTION ET DE SANCTION EN CAS D'ACTION ILLICITE CONTRE L'AVIATION CIVILE INTERNATIONALE by CLAUDE EMANUELLI. Paris: Editions Pedone. Biblio. 1974. Pp. 159. \$6.90 paper.

*Robert A. Friedlander**

During the past six years, paralleling the growth of international terrorism to almost crisis proportions, there have been 294 separate incidents of aerial highjacking. In that same period two international Conventions were signed at the Hague (1970) and in Montreal (1971), and both have entered into force. A Memorandum of Understanding between the United States and Cuba was agreed upon in 1973, as was a similar pact between Canada and the Castro regime. Yet, despite the veneer of international cooperation, skyjacking continues, and the problems of the past remain the portents of the future.

Originally delivered as a series of lectures at the Hague Academy, Professor McWhinney's study is a thoughtful and often disturbing analysis of the illegal diversion of aircraft. Although it may be considered by some as terrorism in its most striking and dramatic form, aerial highjacking covers a broad range of problems which by their very complexity almost defy any proposed uniform solution.

McWhinney correctly points out that those who have attempted to deal with the legal ramifications of skyjacking do not share mutual beliefs, nor do they maintain similar expectations. The one common element in the illegal acts themselves is "the forcible diversion of an aircraft in flight, against the will of its air crew."¹ Sky banditry is,

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1. E. McWHINNEY, THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 7-8 (1975).

however, a polycentric problem. The motivation may be political, but it also can be economic and psychological. It involves a wide variety of issues that require pluralistic solutions. The monolithic approach, represented by the three major aircraft Conventions of Tokyo (1963), the Hague, and Montreal, actually raises more problems than it solves. National objectives and politicization of basic issues which affect the entire community of the air have resulted in a general failure within the world community to develop sanctions "that really do have some teeth in them."²

While he is extremely critical of the record of the United Nations on the subject, and deplores the widening international breach between the concept of freedom of the air and the principle of national self-determination, McWhinney surprisingly suggests that "highly political problems" be referred to the U.N. Recognizing the growing dangers of "individual, isolated acts of terrorism," the author favors the application of the international legal doctrine of State Responsibility. The alternative, he suggests, is the type of unilateral action carried out by the Israelis against the Lebanese. If multilateral conventions are not feasible in the area of sanctions and control, then bilateral, limited accords between two or more parties are preferable to none at all. Individual nation-states, he urges, should first put their own houses in order before criticizing others for failing to develop an effective international air security system.

The short chapters dealing with the aforementioned Conventions and with the various international air agencies and private associations are models of concise, thought-provoking analysis. The author concludes with a series of questions dealing with ten identifiable problems of illegal diversion which still call for resolution. The impression left with the reader is that customary international law is either too complex or too simplistic to deal effectively with the overall problem, and the most effective approach may well be the utilization of primarily diplomatic means to achieve the desired goal of safe passage in the air.

Nancy Douglas Joyner has placed the issues of aerial highjacking within the general context of air piracy, an approach which Professor McWhinney largely rejects. Dr. Joyner's treatment is historical, placing emphasis upon the traditional doctrine of piracy, its legal development throughout the past three centuries, and its possible contemporary application, especially in light of Article 15, Section 1, of the Geneva Convention on the High Seas. Like McWhinney, Joyner is basically skeptical of the efficacy of the Geneva definition, preferring instead the

2. *Id.* at 97.

Montreal and Hague agreements. In the end, she echoes McWhinney's nomenclature, preferring "unlawful aircraft seizures" to the terminology of air piracy.³

The two scholars differ, however, over the desirability of bilateral agreements. According to Dr. Joyner, international aircraft conventions dealing with the problem of illegal diversion have been the swiftest means of combating the threat and the most forceful. Although her categories of highjacking motivations are similar to those of McWhinney, her treatment of political crimes centers almost exclusively on escaping criminals and political refugees. The ideologically motivated offender is lightly passed over, but it is this very group that continues to plague the international community as demonstrated by the recent activities of dissident Phillipine Moslems. One may admire the author's faith in multilateral conventions, but the utilization of commandeered aircraft in hostage situations has not abated, and Libya still provides safe-haven for terrorist actors.

Professor Emanuelli begins his carefully detailed study by pointing out that no solution can be entirely juridical, and that extra-legal considerations must be taken into account. He begins by examining the legal and political issues raised by ground control, where the U.S. approach has been the most extensive and the most effective. Jurisdictional questions are analyzed in detail, and the author inevitably concludes that "the principal obstacle to a consensus resides in the old concept of national sovereignty."⁴

Emanuelli argues persuasively for a distinction to be made between actors seeking political asylum and those involved in terrorist activities, including sabotage. The latter must be made subject to greater penalties, particularly a firm policy of extradition. As with the other two studies, the Hague Convention is credited with providing the most extensive sanctions yet devised, and thus it can be given a more effective application than the Geneva Convention on the High Seas. However, in Emanuelli's view, the Hague Convention does not go far enough. He advocates the promulgation of a new agreement or protocol which would extend the piracy approach and which would totally disregard political considerations. This reviewer is in complete accord.

McWhinney tends to be more pessimistic than either Joyner or Emanuelli with respect to the future regulation of unlawful seizures. The latter author refers to pressures brought by pilots, the commercial airlines themselves, and public opinion as inevitably influencing collective

3. N. JOYNER, *AERIAL HIGHJACKING AS AN INTERNATIONAL CRIME* 264 (1974).

4. C. EMANUELLI, *LES MOYENS DE PRÉVENTION ET DE SANCTION EN CAS D'ACTION ILLICITE CONTRE L'AVIATION CIVILE INTERNATIONALE* 145 (1974).

state action. But as long as even one safe-haven remains, as long as the political offense exception to the requirement of extradition is still applied to ideologically motivated offenders, and as long as political considerations take precedence over the public's absolute right to safe passage under any and all conditions, fear will continue to ride the skies as an unwelcome companion for air travelers everywhere.